IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

MICHAEL RODAK, JR., CLERK

73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioners,

v.

FOREST CITY PUBLISHING CO., a corporation, JOSEPH ESZTERHAS and RICHARD T. CONWAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENTS

I.

RESPONDENTS' ARGUMENTS CONTAIN MISSTATEMENTS, INACCURACIES AND BASELESS LEGAL CONCLUSIONS.

From the Summary of Argument (Resp. Brief, p. 5) through the Conclusion (Resp. Brief, p. 16) Respond-

ents' Brief misleads through misstatements, inaccuracies and baseless conclusions as to both factual and legal issues involved in the within case.

The case was not, as stated by Respondents, tried to the jury as a simple "false light" invasion of privacy, but rather on the intrusionary physical trespass of the respondents and the resulting fictionalized, defamatory false light publication.

The Court of Appeals made no finding "that the article was newsworthy—" as asserted at page 10 of Respondents' Brief.

Neither the District Court, the jury nor the Appellate Court below found that the article was non-defamatory.

Contrariwise, the Opinion of the Court of Appeals (App. 121, 122) clearly points out that "The Sunday Magazine of the Cleveland Plain Dealer for August 4, 1968 carried as its lead feature a story entitled, "Legacy of the Silver Bridge"; that: "The complaint alleged that the privacy of the plaintiffs had been violated by the intrusion of the newsman and photographer, for unreasonable publicity about their private lives and for falsely presenting their condition and making them objects of pity and ridicule".

It is respectfully submitted that the evidence and proofs put to the jury were in support of both the intrusion and the false light defamation as asserted in the complaint. The Court of Appeals (App. 125) observes: "The two newsmen may have been guilty of a trespass against the property of the Cantrells". In view of the positive finding of the jury in regard thereto, it is respectfully submitted that the observation of the learned Court of Appeals is at this juncture an

understatement; but the record is devoid of any contrary holding below, so as to justify the argument of Respondents that the case is solely based on the "false light" publication.

Respondents' capable counsel incorporate in their argument unwarranted implication that the courts below have made a determination that the newspaper article complained of was not defamatory. At page 14 of Respondents' Brief, the following:

> "The right of the people to know is not served, and freedom of the press is not guaranteed, if, as in this case, Courts determine that a newspaper article is not defamatory, . . ."

II.

RESPONDENTS' ARGUMENTS ARE BASED ON THEORY NOT APPLICABLE HEREIN AND MISCONCEPTIONS OF APPLICABLE LAW.

Having launched their argument on the misstatements that the Appellate Court below "found that the article was newsworthy–" and "not defamatory", Respondents depart from the record entirely, ignore the affirmative special jury verdict on the issue of invasion of plaintiffs' privacy, (App. 114-115), the District Court's instruction to the jury as to the asserted intrusory invasion complained of, (App. 99), Respondents' failure to either plead or argue below that any current "news" event occasioned the publication; and would now urge

that the precise factual and legal gounds for "public interest" dismissal in Time, Inc. v. Hill justify dismissal herein. In fact no current news event related to either the Silver Bridge disaster or to the Cantrells when the false, fictionalized, feature story here involved was conceived by the writer or his editor, or when it was published; and no such "news" was alluded to in the article; yet Respondents argue that it was "newsworthy", without setting forth any legal support for such assertion.

"Newsworthy" is defined in Webster's New Twentieth Century unabridged Dictionary as: "a. having the quality of news; timely, important, and interesting".

Contrary to the statement of the learned Appellate Court (App. 129) that "No test has been authoritatively formulated for judicial review of "newsworthiness' in these cases", the law has indeed not only clearly differentiated "news" from creative writing, but has historically protected the right of the public to news and the right of the creative writer to his property in his writings.

Bouvier's Law Dictionary, 1928 edition, defines news, and distinguishes it from other writings as follows:

> "NEWS. Information respecting current events. The history of the day. It is not the creation of the writer, but is a report of matters that ordinarily are publici juris. 248 U.S. 234. There is a distinction between the substance of the information (news element), and the particular form or collocation of words in which the writer has communicated it (literary element)."

Bouvier's reference to 248 U.S. 234 is to the celebrated and instructive case decided by the Supreme Court in 1928, *International News Service*, Petitioner, *v. Associated Press*, 63 L.Ed. 211, wherein, contrary to the present-day arguments of the publishers that Constitutionally guaranteed freedom of the press entitles them to unhampered access to source for news, the petitioner association of publishers urged that since it cost substantial investment in obtaining news that it became the property of the publisher to the exclusion of any competitor to reprint same. This Honorable Court held that while there is no property in news, trade decency should require acknowledgment of the source when it is lifted from a competitor's publication. Moreover, while acknowledging that an article may combine news with creative literary writing, nevertheless:

> "But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. 1, S 8, P. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

The Supreme Court noted (p. 235) in that case that:

"The peculiar value of news is in the spreading of it while it is fresh;"

Webster's definition of "news" was further written into law by the United States Court of Appeals for the Seventh Circuit in the case of *Wagner v. Fawcett Publications*, 307 F.2d 409, 411.

There has been no modern "re-definition" of "news"; and therefore try as they might Respondents cannot but urge that in order to sustain their unique application of the term "newsworthy" to the facts in the within case, that this Honorable Court should now effect such re-definition.

III.

THE FIRST AMENDMENT DOES NOT EXPAND THE COMMON LAW LIBERTY OF THE PRESS.

Close attention to the structure of the First Amendment compels a narrower view of press freedom than has been granted by decisional law; but certainly the Amendment does not warrant a widening of such rights.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press". It does not grant a wider freedom than previously was recognized in law, but prohibits legislative narrowing of such freedom.

Bouvier, defining Liberty of the Press, calls our attention to such pre-existing freedom in the following:

"LIBERTY OF THE PRESS. The right to print and publish the truth, from good motives and for justifiable ends. 3 Johns. Cas. 394.

The right in the publisher of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be responsible. 13 W.Va. 182.

The right to print without any previous license, subject to the consequences of the law. 3 Term 431.

The right to publish in the first instance as the publisher pleases, and without control; but for proceeding to unwarrantable lengths he is answerable both the the community and to the individual. 4 Yeates 267. Liberty of the press means not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords; Cooley, Const. Lim. (422). See Story, Const. SS 1870, 1888, 1891. It is said to consist in this "that neither courts of justice nor any judges whatever are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed." De Lome, Const. 254.

At common law liberty of the press was neither well protected nor well defined, and not until after many struggles was it so far recognized in England as to permit the publication of current news without the permission of government censors. May, Const. Hist. c.7,9,10. The general publication of parliamentary debates dates only from the

American revolution, and even then was considered a technical breech of privilege; Cooley, Const. Lim. (418). A fair publication of a debate is now held to be privileged, and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances; L.R. 4 Q.B. 73.

In the colonial period the English practice was followed in this country. In 1649 the general laws were published for the first time in Massachusetts under protest by the magistrates, and in Virginia and New York printing was specially prohibited. The constitutional convention of 1787 sat with closed doors, as did the senate until 1793. By the constitution liberty of the press is secured against restraint in the United States, but he who uses it is responsible for its abuse. Like the right to keep firearms, it will not protect the user from annoyance and destruction caused by him; 3 Pick. 313. The Sedition Act, July 14, 1798, attempted a restriction upon the freedom of the press, but by its terms it was self-limited; its constitutionality was always doubted by a large party, and its impolicy was beyond question. See Whart. St. Tr. 333, 659, 688; 2 Rand. Life of Jefferson 417; 5 Hildr. Hist. U.S. 247; Ord. Const. Leg."

The law has often been required to qualify literary works for purposes of copyright, patent, mail rate privilege, etc., and to qualify "newspapers" for legal advertising publication, inter alia. More recently, for the purpose of preserving "independent and competitive" newspapers which may become victims of economic distress, the Act of July 24, 1970, 15 U.S.C. Commerce

and Trade, sec. 1801 makes it absolutely essential that the courts of the United States continue their judicial concept of a newspaper, and that they not accept the conclusion of the United States Court of Appeals for the Sixth Circuit that the determination of the editors of publications claiming to so qualify should be controlling on the courts.

IV.

CONCLUSION

Wherefore, it is respectfully submitted that the feature story here involved was neither "newsworthy" itself nor privileged by reason of any related "news" report; and being false, fictionalized and defamatory of private persons whose private residence was trespassed upon for the sole purpose of creating such feature article, without any lawful consent or permission in the ultimate publication, that the judgment of the District Court on the verdict of the jury, being compensatory and not punitive, based on evidence of record, should be reinstated, with interest and costs.

Respectfully submitted,

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